

October 2014 Baby Bar Question 4 - Contracts

1. DOUG V. ELLEN

Valid Contract

A valid contract requires a showing of mutual assent and consideration.

The facts state Doug and Bill entered into a contract under which Bill was to build a building for Doug for \$100,000. Since the parties entered into a contract, there was mutual assent.

Further, Doug bargained to pay \$100,000 to Bill to build a building in exchange for Bill's return promise to build a building. Bill bargained to build a building in exchange for Doug's return promise to pay \$100,000 to Bill. Thus, there is consideration.

Therefore, a valid contract exists.

Assignment

An assignment is a transfer of an existing right under the terms of an existing contract.

Are the Rights Assignable?

Contract rights are assignable if they are not too personal in nature, prohibited by contract, or prohibited by law.

The contract right to be assigned under the Doug-Bill contract was Bill's right to receive the full amount \$100,000 from Doug to build a building. Bill hired Ellen, an electrical contractor, to do the electrical work for the building for \$15,000. The assignment of a contractual right to do the electrical work for the building and receive \$15,000 is not too personal in nature to assign. Further, there are no facts that state the contract prohibited the assignment of the contract. In addition, the assignment of some of the money is not prohibited by law.

Therefore, Bill had the power to assign his rights to Ellen although he would remain primarily liable for damages resulting from any breach under the terms of the contract.

Has There Been a Valid Present Assignment?

An assignment requires a present intention to transfer existing rights from the assignor to the assignee.

When Doug assigned his right to Ellen to do the electrical work for the building, Ellen undertook the rights to do the electrical work. The act of Bill entering into a contract

with Ellen for her to do the electrical work for the building, and the act of entering into a contract, shows that Bill, the assignor, had the present intent to transfer his existing rights to Ellen, the assignee. Bill had the right to receive money for the electrical work done on the building. Bills act of paying \$3,000 in progress payments indicates Doug's present intent to allow the assignment from Bill to Ellen.

Based on Ellen's conduct of receiving the progress payments, Ellen has stepped into Bill's shoes and assumed all the rights of enforcement that Bill had prior to the transfer.

Therefore, there was a valid present assignment.

Delegation of Duty

A duty may be delegated unless the duty is too personal in nature, prohibited by contract, or prohibited by law.

Doug will contend the contractual duty to be delegated was the duty to provide all of the electrical work for the building that Bill was contracted to build. The installation of electrical wires is not too personal in nature to delegate.

Bill under the terms of the contract between Ellen and himself transferred the obligation of the electrical wiring of the building to Ellen. The delegation of installing the electrical wiring would not be a material alteration under the terms of the contract. Therefore, the delegation of the electrical work was not too personal to delegate to Ellen. Further, there are no facts stating that the contract prohibited the delegation of the duty or that the assignment of the electrical work required for the building under the contract was prohibited by law.

Therefore, the contract was properly delegated to Ellen.

Was the Duty Assumed by Ellen?

An assumption of a duty takes place if a promise is given for consideration to perform another's duty.

Bill assigned part of his contract with Doug to Ellen when he contracted with Ellen to do the electrical work needed for the building. Once Ellen took \$3,000 in progress payments, she discovered she could not do the electrical work profitably. Thus, by Ellen's conduct of doing the electrical work for the building she has promised to perform under the terms of the Doug-Bill contract.

Therefore, the duty was assumed.

Having Found a Valid Assignment between Bill and Ellen, Does It Raise Rights in Doug as a Third Party Beneficiary?

Third Party Beneficiary

A third party beneficiary contract is one wherein performance by the promisor will benefit a third party. Her status arises at the formation stage of the contract.

As part of Doug's partial assignment and delegation with Ellen, Ellen agreed to provide the electrical services for the building which Bill contracted with Doug to build. The performance of this promise was meant to fulfill Bill's obligation under the terms of the contract entered into with Doug for the building of the building. Bill's assigning and delegating partial of his obligation under the Doug-Bill contract was an act to benefit Doug, the third party.

Paula's rights were created at the time that Bill assigned the electrical work to be completed by Ellen to Ellen. Doug's status arose at the formation stage of the contract, i.e., the assignment and delegation.

Therefore, Doug has enforceable rights as a third party beneficiary.

Privity of Contract

Privity of contract is the interest or relationship which exists between two or more contracting parties.

Ellen will assert Doug was not a party to the assignment and delegation and, therefore, has no interest or relationship in that contract upon which to sue since Ellen made her promise to provide all electrical service to Bill, not Doug.

Doug will rebut that although he was not a party to the Bill-Ellen assignment and delegation, privity is not required for him to assert his rights as a third party beneficiary under **Lawrence v. Fox**.

Thus, the lack of privity will not bar Doug from asserting his rights.

Intent to Benefit

Intent to benefit is defined as the promisee's intent to extract a promise from the promisor to benefit a third party.

Doug will contend when Bill extracted Ellen's promise to provide the electrical services needed for the building to Bill, Ellen intended to benefit Doug. This promise was made at the time of the Bill-Ellen contract which further demonstrates Bill's beneficial intent to Doug.

Classification - Creditor Beneficiary

If the promisee's primary intent is to discharge a duty owed to the third party, the third party is a creditor beneficiary.

Bill's assignment of the rights under the terms of the Bill-Allen contract created a debt owed to Doug. Bill believed his obligation to provide the electrical services for the building was to be satisfied as demonstrated by her agreement with Bill to provide the electrical services. When Bill contracted to with Allen to provide the electrical services, Bill intended to discharge his obligation owed to Doug under the terms of the Doug-Bill contract.

Therefore, Doug would be classified as a creditor beneficiary.

Vesting

The Restatement Second states that the rights of any intended beneficiary vest when there is notice of and assent to the promisee, he brings suit to enforce the promise or materially changes position in justifiable reliance thereon.

As argued supra, the court should rule Doug was a creditor beneficiary. Doug will argue that although he had no notice and did not assent to the Bill-Allen assignment contract, when a developer hires a builder to build a building it is customary that they assign the work out to individuals to do the electrical, plumbing, and building of the structure. Such is the nature of the frequent role of subcontractors on a construction project. Thus, there is implied notice and he (Doug) assented, which made his rights vest as a third party creditor beneficiary.

Hence, Doug can sue Allen under the original obligation under the Bill-Allen contract.

Breach

A breach is an unjustified failure to perform which goes to the essence of the bargain.

When Allen quit the job because she could not profitably do the electrical work for \$15,000, she established an unjustified failure to perform going to the essence of the contract. Allen's statement that she, in turn, would not perform her contract was an anticipatory breach. Since Allen's breach went to the essence of the Bill-Allen contract, this would constitute a major breach.

Therefore, there was a major breach of the Bill-Allen contract by Allen.

General Damages

General damages are damages that flow from a breach of the contract. The non-breaching party is entitled to expectancy damages under the contract.

Doug will seek cover damages, which is the difference between the contract price and the fair market value. Further, to the extent that there were delay damages that resulted to Doug from Ellen's breach, she would be liable for those damages as well.

2. Is Ellen liable to Bill for:?

a. The loss of the on-time bonus? Discuss.

Was there an enforceable contract between Bill and Ellen?

Defined and discussed supra.

Thus, there was a valid contract between Bill and Ellen.

Breach

Defined and discussed supra.

Therefore, Ellen breached her contract with Bill.

Special Damages

Special damages are those damages that must be specially pled and proven by plaintiff and must be contemplated by the parties at the time of contract formation..

Bill will argue that when he entered into his contract with Ellen that it was reasonable foreseeable that he could incur damages, including loss of compensation, if Ellen failed to perform her subcontract with Bill. Moreover, Bill will argue that his loss of compensation foreseeably would have included in his loss of an on-time bonus for completing the contract. In fact, Ellen learned that Bill would receive an on-time bonus prior to commencing work on the project.

Ellen will likely counter that Bill never informed her prior to formation of the Bill-Allen contract of Doug's agreement to pay Bill a \$10,000 on-time bonus if the project was completed on time. Instead, she only learned of the bonus after entering the Bill-Allen contract, albeit before commencing her work on the project.

Unfortunately under the circumstances, Bill has failed to meet the requirements to receive his on-time bonus from Ellen.

b. For any other damages? Discuss.

General Damages

Defined supra.

Bill will also seek to recover the damages and costs he incurred related to Ellen's failure to complete the scope of her work under the Bill-Allen contract.

For example, Bill paid Ellen \$3,000 in progress payments and then the cost to cover the scope of Ellen's uncompleted electrical work. The total amount of Bill's out of pocket to Ellen and to cover by hiring another contractor was \$3,000 plus \$20,000, or \$23,000 total. The contract price agreed to was \$15,000. To make Bill whole, he is entitled to receive the difference between the contract price and his out of pocket payments to complete the electrical work that Ellen failed to perform.

As such, Bill is entitled to receive damages of \$8,000 from Ellen for her breach of the contract.